HJH. AMINAH BAKRI

v.

MANISAH HJ. BAKRI & ORS.

HIGH COURT, SINGAPORE
CHAO HICK TIN JC
[ORIGINATING SUMMONS NO. 976 OF 1987]
1 NOVEMBER 1988

SUCCESSION: *Probate - Administration - Sale of land - Part of estate - Approval of Court necessary - Best price to be obtained.*

The plaintiff made an application that the sale of land which formed part of the estate of which the plaintiff was an executrix and trustee by the first defendant who was also an executrix and trustee of the estate to the third defendant be not approved by the Court. It was provided in the agreement between the first defendant and third defendant that the approval of the Court had to be obtained, if necessary. The third defendant was aware that the said land was part of an estate. Subsequently, the plaintiff obtained a higher offer for the said land from another party. The issue was whether the approval of the Court was necessary.

Held:
The Court did not sanction the sale of the said land to the third defendant. It was necessary to obtain the approval of the Court as the Court had to ensure that the best price was obtained. There was a higher offer for the said land from another party.

Cases referred to:
Re Mercury Model Aircraft Supplies Ltd. [1956] 2 All ER 885
Re An Inquiry [1988] 2 WLR 33
Colyton Investments Pty Ltd. v. McSorley [1962] 107 CLR 177
Prenn v. Simmonds [1971] 1 WLR 1381
Che Ah & Che Yang Kelsom v. Che Ahmad [1941] MLJ 105
Yap Yoke Luan v. Ong Wee Tok [1983] CLJ (Rep) 433

Legislation referred to:
Conveyancing and Law of Property Act, [Sing] s. 35(2)
Rule of Supreme Court 1970, [Sing] O.80 r.2(3)(d)

Other sources referred to:
Chambers Dictionary and Concise Oxford Dictionary
Black's Law Dictionary (5th Edn.)
Chitty on Contract (Vol. 1) 25th Edn. at para. 818

For the plaintiff - Namazie; M/s. Mallal & Namazie
For the 1st defendant - HA Jalil; M/s. Jalil & Associates
For the 2nd defendant - Kamil; M/s. Kamil & Co.
For the 3rd defendant - Robert Wee; M/s. S.W. Tay & Co.

JUDGMENT

Chao Hick Tin JC:

The plaintiff is one of two executrices and trustees of the estate of one Haji Habsah binte Haji Hassan (the Testatrix) who died on 26 December 1983. The other executrix and trustee is the 1st defendant. Under the will, the Testatrix, subject to the payment of just debts and funeral and testamentary expenses, "give, devise and bequeath all my estate both real and personal of whatsoever nature and wheresoever situate unto my trustees absolutely to be divided between them in equal shares." Both the plaintiff and the 1st defendant are not the natural but are the adopted children of the Testatrix.

On 13 March 1987, by an amended petition, the plaintiff and the 1st defendant applied for a grant of probate of the said will, which was granted shortly thereafter. However, on 23 January 1987, well before any application was made for the grant of probate and without consulting the plaintiff, the 1st defendant gave an option to Polysos Enterprises (Pte) Ltd. (hereafter called "Polysos": the 3rd defendant herein) to sell Lot 1448 MK 23, otherwise known as No. 66 and 66A, Lorong Melayu, off Changi Road, Singapore (the property) at a sum of $432,600. The option was exercised by Polysos on 6 February 1987. The plaintiff was in the dark regarding this proposed sale until 19 February 1987. The property is the only asset of the estate. The option was given by the 1st defendant without obtaining a valuation report. At that point in time the 1st defendant only obtained, through a telephone conversation with a valuer of Debenham Tewson & City Valuers Pte Ltd., a rough indication as to the worth of the property. It was only on 21 February 1987 that the valuer gave a valuation report wherein he stated that the property was valued as on 23 January 1987 at $450,000. For completeness I should at this juncture add that the Estate Duty Branch has on 11 February 1988 placed a value of $800,000 on the property as on the date of death of the Testatrix i.e., 26 December 1983. Further on 23 March 1988, at the request of the solicitors for the plaintiff, M/s. Kiong Chai Woon & Co. Pte Ltd. gave the following values of the property on the dates indicated:

26 December 1983 $700,000	(a date of death of Testatrix)
23 January 1987 $550,000	(date of option)
3 August 1987 $600,000	(date on which the plaintiff entered into a conditional contract of sale with a new purchaser)
23 March 1988 $600,000	(date of valuation report)

On 14 May 1987, the plaintiff received an offer to purchase the property at $560,000. Polysos was asked whether they would match that price. However, they refused, stating that the estate was bound by the option given by the 1st defendant. Later on 3 August 1987, the plaintiff entered into a conditional contract of sale with the new purchaser at a price of $560,000.

In this originating summons, a number of reliefs are prayed for, the first of which is to seek the Court's disapproval of the sale effected by the option granted by the 1st defendant to Polysos. As Polysos are obviously interested and would be affected by the first prayer, I allowed, on the application of Polysos, that they be added as the 3rd defendant. The 2nd defendant is a beneficiary of the estate of the testatrix, being a nephew of the Testatrix. There is agreement as between the plaintiff and the 1st and 2nd defendants on all the prayers in this originating summons. But I should state that on

the first prayer, the stand of the 1st defendant is that she leaves it to the Court, since she is the person who gave an option to the 3rd defendant subject to the approval of the Court. Therefore, the contest on the first prayer is between the plaintiff and the 2nd defendant on the one side and the 3rd defendant on the other.

The option of 23 January 1987 has the following clause:

> 15. The property is sold subject to my obtaining the Court's approval to sanction the sale, if necessary.

It is not denied by the 3rd defendant that they knew that the property belongs to the estate of the Testatrix and that the 1st defendant was selling as an Executrix. Clauses 10 and 11 of the option say so.

On or about 28 January 1987, before the option was exercised, the 3rd defendant's solicitor (Mr. Tay) rang up the 1st defendant's solicitor (Miss Jalil) requesting for a deletion of Clause 15 since it was quite unnecessary to obtain the Court's approval - the Testatrix died less than six years ago. Miss Jalil informed Mr. Tay that the 1st defendant would not agree to the deletion because although consent of Court is not required under s. 35(2) of the Conveyancing and Law of Property Act, there "might be beneficiary/beneficiaries in the estate who might be objecting to the sale of the estate property and that as such if any of the said beneficiary/beneficiaries or the residuary legatees in the will of the deceased were to object the same, a Court order sanctioning the sale must be obtained..." Following that telephone conversation a copy of the will of the Testatrix was collected on that same day by a clerk of Mr. Tay. These facts are not disputed by the 3rd defendant. No affidavit in denial has been filed by either the 3rd defendant or their solicitor, Mr. Tay.

Therefore, when the 3rd defendant exercised the option on 6 February 1987, they were well aware of the fact situation - that there is another executrix and trustee who is on the face of the will entitled to a half share of the estate.

I should also add that arguments have been submitted to me by Counsel for the plaintiff that under Muslim law, a Muslim cannot given away more than one third of his estate by will; that under Muslim law, two thirds of the estate must go to the heirs of the Testatrix unless the heirs agree to the excess requests. Accordingly the plaintiff submitted that the 3rd defendant must have known or be deemed to have known that there will be other beneficiary or beneficiaries to the estate besides the plaintiff and the 1st defendant. A related point raised is that Muslim law does not recognise adoption. For reasons dealt with hereafter, there is no need for me to address these questions. Neither did Counsel for the 3rd defendant make any submission on them.

There are really two questions for me to decide in relation to the first prayer. First, is there a firm contract to sell and buy the property pursuant to the option given on 23 January 1987 and exercised by the 3rd defendant on 6 February 1987? Second, if the answer to the first question is in the negative, should this Court, in the circumstances, approve the said sale.

The answer to the first question will depend on the correct interpretation of the words "if necessary" in Clause 15. Counsel for the 3rd defendant submitted that the expression "if necessary" should be construed to mean as required or necessitated by law. He relied on the meanings of the word "necessary" given in *Chambers Dictionary and Concise*

Oxford Dictionary - "indispensable"; "that must be done". He also cited the case *Re Mercury Model Aircraft Supplies Ltd.* [1956] 2 All ER 885 to say that "cautiousness" is not "necessary". That case concerned a matter of taxation between solicitor and client.

On the other hand, Counsel for the plaintiff argued that "if necessary" should not in the circumstances be interpreted to mean "required by law". My attention was drawn to a very helpful passage in *Black's Law Dictionary* (5th Edn.) where the following is stated as regards the word "necessary":

> This word must be considered in the connection in which it is used, as it is a word susceptible of various meanings. It may import absolute physical necessity or inevitability or it may support that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought. It is an adjective expressing degrees, and may express mere convenience or that which is indispensable or an absolute physical necessity. It may mean something which in the accomplishment of a given object cannot be dispensed with, or it may mean something reasonably useful and proper, and of greater or lessor benefit or convenience, and its force and meaning must be determined with relation to the particular object sought.

In a recent case *Re An Inquiry* [1988] 2 WLR 33, the House of Lords had the occasion to consider the meaning of the word "necessary" in the context of s. 10 of the English Contempt of Court Act 1981, the relevant parts of which read "No Court may require a person to disclose ... the source of information contained in a publication ... unless it be established ... that disclosure is necessary for the prevention of crime." Lord Griffiths said at p. 64-5:

> 'Necessary' is a word in common usage in everyday speech with which everyone is familiar. Like all words, it will take colour from its context ...
>
> I doubt if it is possible to go further than to say that 'necessary' has a meaning that lies somewhere between 'indispensable' on the one hand and 'useful' or 'expedient' on the other and to leave it to the Judge to decide towards which end of the scale of meaning he will place it on the facts of any particular case. The nearest paraphrase I can suggest is 'really needed'.

In the light of the authorities above and in the context of the option, I am unable to accept the submission of the 3rd defendant that the word "necessary" in Clause 15 must be construed to mean "required by law". What is necessary in particular case is a question of fact. The 3rd defendant was at the relevant time aware that the 1st defendant was selling the property as an executrix. The plaintiff conceded that one of two executors of an estate can enter into contractual arrangements binding on the estate. But it seems to me clear that Clause 15 was inserted specifically for the protection of the 1st defendant, i.e., she reserves to herself the liberty to apply for the sanction of Court, if it is thought necessary for her protection. She explained that at that time the beneficiaries of the estate had yet to be determined. An instance where such an application to Court would be necessary is where a beneficiary or a co-executrix explicitly alleges that the executrix has sold the property grossly below market price and thus caused loss to the estate. In the face of such an allegation, as has occurred here, I do not see how one can argue that it is not necessary to obtain the Court's approval pursuant to Clause 15. The 1st defendant would open herself to a claim for a *devastavit* if she did not do so: see *Colyton Investments Pty Ltd. v. McSorley* [1962] 107 CLR 177.

I have reached this conclusion without taking into account the very important telephone conversation that took place between the 1st defendant's solicitor (Miss Jalil) and the 3rd defendant's solicitor (Mr. Tay) on 28 January 1987. If that telephone conversation is taken into account it puts beyond a shadow of doubt as to the intention of the parties on Clause 15.

Counsel for the 3rd defendant submitted that the facts relating to this telephone conversation deposed to in the affidavit of Miss Jalil should not be admissible by this Court. He said this would violate the parol evidence rule. He relied on s. 94 of the Evidence Act which provides that "no evidence of any oral agreement or statement shall be admitted as between the parties ... for the purpose of contradicting, varying, adding to, or subtracting from its terms.

However, Counsel for the plaintiff submitted that the facts deposed to by Miss Jalil do not contradict, vary, add to or subtract from the option granted by the 1st defendant. All that is sought to be done is to set out the background relating to the transaction and the reasons behind the inclusion of Clause 15, particularly the expression "if necessary." He argued that the introduction of these facts is not to alter the written provisions of the option but only to explain a clause therein.

There are ample authorities to support the submission of Counsel for the plaintiff. I need only refer to *Prenn v. Simmonds* [1971] 1 WLR 1381 where Lord Wilberforce made the following pertinent observations at p. 1383-4:

> The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations. There is no need to appeal here to any modern, anti-literal, tendencies, for Lord Blackburn's well known judgment in *River Wear Commissioners v. Adamson* [1877] 2 App Cas 743, 763 provides ample warrant for a liberal approach. We must, as he said, inquire beyond the language and see what the circumstances were with reference to which the words were used, and the object, appearing from those circumstances, which the person using them had in view. Moreover, at any rate since 1859 (*Macdonald v. Longbottom*, 1E & E 977) it has been clear enough that evidence of mutually known facts may be admitted to identify the meaning of a descriptive term.

The rationale for permitting the admission of such extrinsic evidence is explained by *Chitty on Contract* (Vol. 1) 25th Edn. at para. 818 in this way:

> Extrinsic evidence of this sort does not usurp the authority of the written instrument. It is the instrument which operates. The extrinsic evidence does no more than assist its operation, by assigning a definite meaning to terms capable of such explanation or by pointing out and connecting them with the proper subject-matter.

To my mind, on the authorities, I have no doubt that the facts deposed to by Miss Jalil are clearly admissible. In my opinion, far from altering what is in Clause 15, they help to clarify the intention of the parties and the meaning of that clause. Before I leave this point, I would wish to add that the rule against parol evidence embodied in s. 94 is not absolute and one of the exceptions is that "any fact may be proved which shows in what manner the language of a document is related to existing facts." It seems to me clear that the present matter falls within that exception.

Reverting to the first question I posed above, the answer must therefore be in the negative. There is in the circumstances of the case a contract of sale subject to the approval of the Court.

I turn next to the second question: whether this Court should approve the sale of the property to the 3rd defendant. An executrix is a trustee and her duty is to obtain the best price for the assets of the estate that are being sold. The authorities would appear to establish the principle that in considering an application of this kind, the duty of the Court is to see that the estate benefits as much as possible. There is a clear line of authorities on this. The principal case is a decision of the Court of Appeal of the Federation of Malay States in *Che Ah & Che Yang Kelsom v. Che Ahmad* [1941] MLJ 105. There an administrator agreed to sell certain land at $12,777.50, subject to the approval of the Court. Two of the beneficiaries informed the Court that their solicitor had received an offer of $14,000 for the land. The trial Judge approved the sale as he was of the view that the price at which the land was to be sold was not shown to be inadequate at the time of contract. On appeal the sale was disapproved. Terrell JA said (at p. 106):

> In all these cases the duty of the Court is to protect the rights of the parties who have an interest in the property to be sold ...
>
> I cannot accede to the argument put forward by Mr. Rix on behalf of the respondent, the administrator, that the Court must consider the interests of the proposed purchaser under the conditional contract. A purchaser under these conditions is perfectly well aware that his contract has to be approved by the Court before it can be carried into effect and he takes the risk of losing his bargain if a better offer is obtained before the approval of this Court is given, or of being held to his bargain if, for any reason, there has been a fall in the value of the land between the date of his offer and the date of the order confirming the contract ... The learned Judge approved the conditional contract, being satisfied that at the time the offer was made the price was a reasonable one. As I have said above, I do not consider that that is the correct line of approach, the first duty of the Court being to protect the interests of the estate.
>
> The learned Judge seems also to have thought that the effect of the later offer may have been to induce the original pruchaser to increase his offer. If so, I cannot see that that is any objection ...

The principles declared in *Che Ah* were applied in *Re the Estate of Tunku Mohamed Jawa* [1982] 2 MLJ 44 and *Yap Yoke Luan v. Ong Wee Tok* [1983] CLJ (Rep) 433. In the latter case the Malaysian Federal Court reaffirmed that the relevant date to determine whether the price for the property is fair is not at the time of the offer but at the time of the hearing of the application for approval of the proposed sale.

Applying the principles in *Che Ah* to the instant case, there can be no doubt that the proposed sale to the 3rd defendant cannot be approved. The relevant date to determine whether the sale price is fair is the date of hearing of this application. While I note that the difference between the price stated in the option and the valuation made by the valuer of the 1st defendant is really quite small, but just three months after the option was exercised, the plaintiff obtained an offer to purchase at a substantially increased price of $560,000. As stated above, the plaintiff has in fact on 3 August 1987 entered into a conditional contract of sale at that price with the new purchaser. There will be substantial loss to the estate if the sale to the 3rd defendant is approved. I do not think the 3rd defendant will be justified in complaining. They knew that the sale is by an executrix,

and there is a co-executrix who is also a beneficiary. They realized that the Court's approval might have to be obtained. Subsequently they sought to delete Clause 15 without success. They were told why Clause 15 is necessary. They clearly knew the risks involved. The letter of 21 September 1987 from M/s. S W Tay & Co (solicitors for the 3rd defendants) to the solicitors for the 1st defendant is an affirmation by the 3rd defendant that in the circumstances an application to Court to sanction the proposed sale is necessary. In that letter M/s. S W Tay & Co wrote:

> with reference to the last paragraph of your said letter, please let me know whether you have since taken out an application in the High Court to obtain an order of Court sanctioning the sale pursuant to Clause 15 of the option. If not, please let us know when you intend to take out this application and also keep us informed of the latest development.

I think at this juncture I ought to make some comments on the conduct of the 1st defendant. It seems to me that the 1st defendant should have acted with a bit more prudence before she gave the option to the 3rd defendant to purchase the property at $432,000. First, as an executrix and trustee she should have obtained a proper valuation before agreeing to sell. She merely relied on an off-the-cuff response of the valuer over the telephone. But the valuer clearly stated that the response he gave was subject to site inspection and proper valuation to be made. She gave no particulars as to what other efforts she made to find a buyer for the property. Second, the 1st defendant gave the option without even consulting the plaintiff, who is a co-executrix and beneficiary and without letting her know she is a co-executrix or letting her have a copy of the will. I note the 1st defendant's explanation that even if consulted the plaintiff would not have agreed, having regard to her previous stand on selling the property while the Testarix was still living. But the 1st defendant should have at least tried again. In my view, she seems to have acted with undue haste in giving the option. But I would also say that this haste does not appear to be due to any improper motive. She was concerned, rightly or wrongly, about property prices and was afraid that property prices might go down and the estate might suffer. After all it would be to her advantage if the property could fetch a higher price. Fortunately for the 1st defendant, there is the safeguard in Clause 15. I am not for a moment suggesting that the 3rd defendant knew that the 1st defendant gave the option without proper valuation.

There remains a procedural point raised by Counsel for the 3rd defendant which I should briefly deal with. He seems to argue that by Clause 15, it should be the 1st defendant who should make the application to Court to sanction the proposed sale and that this is not the position in the present originating summons. But the fact is that even before the receipt of the letter dated 21 September 1987 from the solicitors for the 3rd defendant and before the 1st defendant could take out an application, the plaintiff herein has already filed the present originating summons on 8 September 1987 to disapprove the proposed sale to the 3rd defendant. Subsequently, the 1st defendant did on 2 March 1988 file Originating Summons No. 194/88 to seek the Court's approval to the proposed sale. In that Originating Summons, like in the present Originating Summons, the 3rd defendant also made an application to be added as a defendant therein. As it was obvious that Originating Summons 194/88 would in effect duplicate what is already before the Court in the present Originating Summons, originating summons 194/88 and the application of the 3rd defendant therein were by consent withdrawn with leave of the Court. In the circumstances, I do not think there is really any merit in this technical objection of the

3rd defendant. It is clear that the 1st defendant has all along wanted to put the matter before the Court and obtain its approval. In her affidavits filed herein, she has expressly said so and has asked the Court to rule on it.

In the result I do not think I ought to sanction the proposed sale to the 3rd defendant. Instead, I would grant an order in terms of the first prayer.

Also found at [1989] 1 CLJ 863